(P) 95-1394

Supreme Court, U.S.
FILED
FEB 28 1996
CLERK

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1995

MILOS J JIRICKO, MD, - PETITIONER

VS.

LAKIN & HERNDON, P.C.
THE LAKIN LAW FIRM, P.C.
THOMAS L LAKIN, Lawyer
THEODORE R.DIAZ, Lawyer
DAVID W.DUGAN, Lawyer
JEFFERY C. WEISHAUPT, Lawyer
- RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES APPEALS COURT FOR SEVENTH CIRCUIT

PETITIONER'S SUPPLEMENTAL APPENDIX 'D',

MILOS J JIRICKO, MD
8007 COTTAGE GARDEN DR.,#302,
GERMANTOWN, MD 20874
301 916 0692

20 pp

SUPPLEMENTAL APPENDIX D:

Memorandum and Order, US District Court for Southern Illinois, East St. Louis, September 19, 1994.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

MILOS J.JIRICKO CAUSE NO:93CV398 WDS
PLAINTIFF

v.

LAKIN & HERNDON,P.C.
THE LAKIN LAW FIRM,PC.
THOMAS L.LAKIN, Attorney at law
THEODORE R.DIAZ, JR, Attorney at law
DAVID W.DUGAN, Attorney at law
JEFFREY C.WEIHAIUPT, Attorney at law
DEFENDANTS.

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court on defendants motion for summary judgment. Plaintiff has filed a response to the motion.

BACKGROUND

Plaintiff, acting pro se, filed this action against various current and former members, and the law firm of Lakin & Herndon, P.C. The complaint raises three claims:(1)fraud and fraudulent concealment; (2) malpractice - negligent misrepresentation;and (3)conversion,which

are alleged are alleged to arise from defendants' prior representation of plaintiff in an action based on an employment dispute against plaintiff's former employer, Illinois Anesthesia (No. 91CV 92 WDS). In his first two claims, plaintiff alleges that as a result of defendants negligent handling of his law suit against Illinois Anesthesia, he lost money damages on his claims. In his third claim plaintiff alleges that defendants converted his property when they refused to turn over his legal files to him once they withdrew from that case. Defendants seek summary judgment on all claims. Fed.R.C.P.56 (c) provides that a district court shall grant summary judgment "if the pleadings, depositions, answers to interrogatories and admission on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to judgment as a matter of law".In determining whether a district court properly granted summary judgment, "all factual inferences are to be taken against the moving party and in favor of the opposing party". International Adm'rs, Inc. v. Life Ins. Co. of N. Am., 753 F2d 1373,1378 (7th Cir. 1985). In instances in which "inferences contrary to those drawn by the trial court might be permissible, a district court grant of summary judgment must be reversed. Munson v. Friske, 754 F2d. 683 690 (7 Cir.1985). Once motion for summary judgment has been made and properly supported, however, the nonmovant does have the burden of setting for specific facts showing the existence of genuine issue of a material fact for trial. See Rule 56(e), Posey v. Skyline Corp., 702 F2d 102,105(7 Cir.), cert. denied 464 US 960 (1983), (noting that " a bare contention that an issue of fact

exists is insufficient to raise a factual issue"). Although a requisite, the existence of a factual dispute is not, standing alone, sufficient to bar summary judgment. It is well settled that a "factual dispute does not preclude summary judgment unless ..."the disputed fact is outcome determinative under the governing law". Egger v. Phillips, 710 F 2d. 292,296 (7 Cir.cert.den.,464 U.S. 918 (1983), cited in Shlay v. Montgomery, 802 F2d. 918,(7 Cir. 1986).In the underlying action, this Court dismissed Count V of Jiricko's complaint against Illinois Anesthesia on a motion to dismiss under Fed.R.C.P.12(b)(6).Count V sough recovery for an alleged conversion by a Dr.Leonard Becker of payments for plaintiff's billed services. Plaintiff alleged that Becker, the president and sole shareholder of Illinois Anesthesia, billed for these

services rather than Illinois Anesthesia. The Court's order of dismissal was based on the fact that Count V did not contain the allegations necessary to satisfy the pleading requirements for a conversion action. After the Court's ruling, defendants determined that a conversion claim would not lie, and based on that determination decided not to file an amended complaint, and advised plaintiff of that decision. (Dugan Aff.Doc.#50, Ex.9).

In August of 1991, plaintiff was informed by defendants that they intended to withdraw from representation of plaintiff. (see Doc.#50, Ex.10). In his deposition, plaintiff acknowledged that he received the correspondence of August 1991, and an additional letter of September 10, 1991, which set forth the specific grounds for defendants' determination that they could no longer

represent plaintiff, or proceed further against Illinois Anesthesia. (See Doc. #50, Ex. 11 and Jiricko depo. Oct.8,1993, pp.76-77). Defendants thereafter filed a motion to withdraw in this Court, and the Court held a hearing on the motion. Appearing at the hearing were David Dugan, an attorney at Lakin & Herndon and a named defendant in this suit; Ferne Wolf attorney for Illinois Anesthesia; and Dr. Jiricko on his own behalf. (See Tr.Hr'g on Motion to Withdraw, No:91-CV-92-WDS, Dec.30,1991).The Court permitted Lakin & Herndon to withdraw from representation of plaintiff, and gave plaintiff thirty days to obtain new counsel, or enter his appearance pro se. (Id at 12) The Court entered a written order on January 2, 1992. After several interim orders concerning plaintiff's failure to comply with the Court's order, the Court dismissed plaintiff's case for

failure to prosecute.(Doc.#50,Exs.13 &14) On August 27, 1993, the Court of Appeals upheld the dismissal in an unpublished opinion. Jiricko v. Illinois Anesthesia, Nos.92-2613;92-2682(7th Cir.Aug. 27, 1993)

DISCUSSION

In the current action, plaintiff premises his claim on the loss of the conversion count in the underlying suit against Illinois Anesthesia. Plaintiff argues at length that the conversion claim had merit, and that he would have been allowed to proceed on that claim, but for defendants' abandonment of his claim (which is the basis for his malpractice assertion). The problem with plaintiff's assertion is that his claim and the lawsuit against Illinois Anesthesia was not lost by any action of defendants, but rather by plaintiff's personal failure to either obtain new

counsel, or enter his appearance pro se in the suit against Illinois Anesthesia. The Court permitted defendants to withdraw from their representation of plaintiff. The reason why they chose to withdraw is clear from the record in No. 91-CV-92-WDS, but, in all actuality, is of little relevance to this suit. Withdrawal granted by order of court does not constitute abandonment. Attorneys regularly seek to withdraw from representation when, for example, their client has not paid his or her legal fees, or the attorney and client are unable to "get along", or the attorney has made a professional judgment that the action is not viable and in all good professional conscience, the attorney can no longer actively pursue the claim. The latter situation arose in the underlying action. (Doc.#50, Ex.11). Whether the

professional judgment of defendants that plaintiff could not maintain a conversion claim against Illinois Anesthesia was valid ar not, as this Court noted, the contract between plaintiff and the defendants included a specific clause which allowed defendants to withdraw under the circumstances. (Tr.Dec.30, 1991 pp. 9-10).

Of consequence to plaintiff's claims based on alleged fraud and malpractice, is the fact that when he Court dismissed the conversion count in No.91-92, it did so pursuant to Rule 12(b)(6), and the dismissal was without prejudice. This means that the Court's Order did not act as a ruling on the merits of the claim, but rather was a ruling on the sufficiency of the pleadings. That is, the validity of the cause of action against Illinois Anesthesia based on

conversion was not a part of the Court's dismissal Order of July 2, 1991. Count V was dismissed because it did not satisfy the pleading requirements for a conversion claim. The dismissal was not final, i.e. plaintiff could have filed an amended complaint which, if properly pleaded, could have included a conversion claim. The Court's Order of July 2, 1991 gave plaintiff thirty days in which to file an amended complaint. No amended complaint was filed be the defendants during that time period, but that fact is not necessarily fatal to plaintiff's conversion claim. Plaintiff could have sought an extension of time in which to file amended pleadings even beyond the time set forth in an order of dismissal, or have sought leave to file an amended complaint our of time for good cause. Plaintiff lost his claim for conversion,

not because defendants failed to file an amended complaint, but rather because plaintiff failed to prosecute his claims. At the time the cause of action was dismissed, no ruling had been made on the merits of the conversion claim, and although technically dismissed, plaintiff could have attempted to amend the complaint to renew these claim. Therefore, the Court finds that plaintiff's claims based on fraud and malpractice must fail.

The only remaining issue, therefore, is plaintiff's claim that the defendants converted his property when they refused to turn over his legal file. Plaintiff address that because defendants did not deliver his file materials to him, they wrongfully converted the property. Under Illinois law:

> A proper complaint for conversion should allege:(1)an unauthorized and

wrongful assumption of control, dominion, or ownership by a person over the personality of another; (2) his right in the property; (3) his right to the immediate possession of the property, absolute and unconditional; and (4) a demand for possession thereof.

Mid-America Fire & Marine Ins. v. Middleton, 127 III App.3d 887, 468 N.E.2d 1335,1338 (1984) (citations omitted). In this instance, there is sufficient evidence in the record that defendants made plaintiff's files available to him, and that there was no refusal to turn them over.(Doc.#50, Exs.13,14). Plaintiff has failed to establish that a conversion of his property occured.The best evidence of this is plaintiff's own deposition which reveals that although he believes that he spoke with someone at defendant law firm about his file, he was unable to remember whether he telephoned or wrote the firm, with whom he spoke, or what was said to plaintiff about his file.

(Jiricko depo.Oct.8, 1993,pp.42-43). He was unable to recall how many letters he sent to defendants requesting the files, or when they were sent. (Id.at 44-45). Plaintiff cites several cannons of the Illinois Rules of Professional Conduct in support of his assertion that defendants were obligated to turn over his legal files on demand, and in their failure to do so, committed a conversion. This assertion is without merit. Although a failure to comply with the cannons which govern attorney conduct may be an ethical breach, it is not a legal conversion. The violation of a Rule does not rise, standing alone, to a cause of action, nor does it necessarily establish that legal duty has been violated. Plaintiff simply has not supported his claim that defendants converted his legal files by refusing to turn them over to him on

demand. As counsel, they did not make an "unauthorized or wrongful assumption of control" over plaintiff's legal file. Plaintiff had, at best, an intangible right of access to information in the files. See.e.g. Corrigan v. Armstrong, Teasdale,et al.,824 S.W2d 92,98 (Mo. App. 1992). The defendants have clearly shown that plaintiff had access to the files. Plaintiff's equivocating at his depositions to what he did when, and his inability to place evidence in the record of his efforts to acquire the files, simply cannot be the basis for a finding of a genuine issue of material fact on this issue. The Court notes that the affidavit of Dugan provides that he never claimed, nor did Lakin & Herndon claim, a right to possess or control plaintiff's legal file. In addition, Dugan avers that he advised plaintiff that the files would

be available for his retrieval after the firm withdrew. Plaintiff has not countered this affidavit.Although he asserts that he never received the May 7, 1992 letter concerning the availability of the file, this does not equal a refusal be the defendants to turn over the file to plaintiff. See, Hobson's Truck Sales,Inc. v. Carrol Trucking, 276 N.E.2d89,91 (III,App.1971)(mere detention without a demand for and refusal to relinquish is not an actionable conversion). The essence of conversion is not acquisition by the wrongdoer but a wrongful deprivation of the owner thereof." A.T.Kearney,Inc. v. Inca Int'l. 477 N.E.2d 1326,1334 (III.App.1985). Plaintiff's failure to pick up his file does not translate into a conversion by defendants. Accordingly, the Court finds that summary judgment is appropriate.

Defendant's motion for summary judgment

is GRANTED, in favor of defendants Lakin & Herndon, P.C.; The Lakin Law Firm,P.C.; Thomas L.Lakin, Attorney at Law; Theodore R.Diaz, Jr., Attorney at Law; David W.Dugan, Attorney at Law and Jeffery C.Weishaupt, Attorney at Law, and against plaintiff Milos J. Jiricko, on all claims. The Clerk of the Court is directed to enter judgment accordingly.

IT IS SO ORDERED.

Dated: 19 September 1994.

signature of William D.Stiehl,

District Judge

No._____

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OCTOBER TERM 1995

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LAKIN & HERNDON,P.C.
THE LAKIN LAW FIRM,P.C.
THOMAS L LAKIN, Lawyer
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DAVID W.DUGAN, Lawyer
JEFFERY C. WEISHAUPT, Lawyer
- RESPONDENTS

CERTIFICATE OF SERVICE

I, Milos J. Jiricko,MD do swear or declare that on the date, 28th of February, 1996 as required by Supreme Court Rule 29, I have served the Petition for Writ of Certiorari on each party to the above proceadings or that party's counsel, and on every other person required to be served, by deposing an envelope containing the above documents in the United States mail properly addressed to the law firm of Moser & Marsalek, P.C., attn. Patrick J. Horgan, lawyer, 200 North Broadway, Suite 700, St.Louis, Mo 63102 and with first class postage prepaid.

I further declare, that on February 29, 1996, I also served in the same manner, 'Supplemental Appendix 'D'.

The names of those served are as follow:

Lakin & Herndon,P.C.; The Lakin Law firm P.C.; Thomas L.Lakin; Theodore R.Diaz; David W.Dugan and Jeffery C. Weishaupt.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 29, 1996.

Milos J Jiricko, MD
8007 Cottage Garden Dr.,#302
Germantown, MD 20874